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NO. 83 - \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term 1983

\_\_\_\_\_  
ANTHONY N. RODRIGUES,  
Respondent,

vs.

KAREN H. KAHALEWAI and  
LEROY KAHALEWAI,  
Petitioners.

\_\_\_\_\_  
PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF HAWAII

and

APPENDICES "A" TO "F"

\_\_\_\_\_  
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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term 1983

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ANTHONY N. RODRIGUES, )

Respondent, )

vs. )

KAREN H. KAHALEWAI )  
and LEROY KAHALEWAI, )

Petitioners. )

---

PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF HAWAII

QUESTIONS PRESENTED

1. Whether Sections 208(5) and 209(1) of the HHCA, as construed and applied by the Hawaii Supreme Court, violate the compact between Hawaii and the United States that the qualifications of lessees shall not be changed except with the consent of the United States?

2. Whether Sections 208(5) and 209(1)

of the HHCA, as construed and applied by the Hawaii Supreme Court, are unconstitutional in that said construction and application deprive Hawaiian lessees and persons of 50% or more Hawaiian blood of due process of law guaranteed by Amendment V and Amendment XIV, in that:

(a) Hawaiian lessees are deprived of the right to contract for the necessities of life and their rehabilitation with their duly designated successors and under supervision by the Hawaiian Homes Commission?

(b) Hawaiian designated successors to Hawaiian lessees are denied the right to contract for necessities of life and their rehabilitation with said lessees even with supervision by Hawaiian Homes Commission?

3. Whether the construction and application of the HHCA herein violates Amendment V in that the result is a confiscation of private property for a public

use without any compensation?

4. Whether Sections 208(5) and 209(1) of the HHCA, as construed and applied, violates Amendment XIII, and 42 USC Sec. 1994 in that said construction and application reduces the designated successor and promisees herein to the status of involuntary servants and/or peons?

5. Whether Sections 208(5) and 209(1) of the HHCA, as construed and applied, defeats the purpose and policy for which the statute was enacted?



## PARTIES TO PROCEEDING

Pursuant to Rule 19(4), only one petition for writ of certiorari is made in that two cases from the same court with identical and closely related questions are involved.

Petitioners pray that a writ of certiorari issue to review the final judgment of the Supreme Court of the State of Hawaii entered in the above-entitled case on November 7, 1983, and the final judgment in companion case Karen H. Kahalewai and Leroy Kahalewai vs. Charles Rodrigues, Anthony Rodrigues, and State of Hawaii, Department of Hawaiian Home Lands, Hawaii Supreme Court No. 7781, entered on September 23, 1983. Both cases involve the construction and application of sections of the Act of Congress known as the Hawaiian Homes Commission Act of 1920 (HHCA), and the same issues and leasehold.

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### CITATIONS BELOW

The Memorandum Opinion in this case, printed in Appendix "A", infra, is reported in --- Hawaii --- (1983). The Order Denying Motion for Reconsideration is reported in --- Hawaii --- (1983) and is printed in Appendix "B", infra.

The Opinion of the Intermediate Court of Appeals in Case No. 7781 (Appendix "C") is reported at 4 Haw. App. --- (1983). Application for Writ of Certiorari to review the aforesaid opinion of the Hawaii Intermediate Court of Appeals was filed August 29, 1983 (Case No. 7781).

The Application for Writ of Certiorari was denied on September 7, 1983 (Case No. 7781; Appendix "D").

Judgment on Appeal was entered on November 7, 1983 (Appendix "E").

### JURISDICTION

The date of the Opinion is August 24,

1983. Judgment on Appeal was entered on November 7, 1983.

Jurisdiction is invoked under 28 USC Sec. 1257(3), with respect to title, rights, privileges, and immunities set up and claimed under the United States Constitution. Jurisdiction is also invoked under Article III, and Rule 17(1)(b) and (c), Rules of the Supreme Court of the United States, in that this is an Act of Congress that has been construed and applied by three Justices of the Hawaii Supreme Court which said construction and application appear to be contrary to the Congressional intent and destructive of the policy and plan of the United States to rehabilitate the Hawaiian race and contrary to Amendments V, XIII, and XIV, of the Constitution.

Pursuant to the Hawaii Admission Act, March 18, 1959 (Pub. L. 86-3, 73 Stat. 4), Hawaii and the United States entered a

compact wherein and whereby the sections of the HHCA involved herein would not be changed except with the consent of the United States. This compact has been breached.

**CONSTITUTIONAL PROVISIONS AND  
STATUTE INVOLVED**

The constitutional provisions involved are Amendments V, VIII and XIV to the United States Constitution. The Acts of Congress involved are Hawaii Admission Act of March 18, 1959, Sec. 4 (Pub. L. 86-3, 73 Stat. 4), Hawaiian Homes Commission Act, 1970, (Act of July 9, 1921, C. 42, 42 Stat. 108, as amended), Sections 208(5), 209(1), 214(1), and 215(1), and 42 USC Sec. 1994.

Article XI, Sec. 1, Hawaii Constitution designated as "Hawaiian Homes Commission Act," and SEC. 2, designated as "COMPACT WITH THE UNITED STATES," and

Section 3, designated as "AMENDMENT AND REPEAL."

The constitutional provisions and statute are printed in Appendix "F", infra.

#### STATEMENT OF THE CASE

These cases arise out of the social, contractual, economic and familial problems thrust upon a Hawaiian family who are 50% or more of Hawaiian blood by the Act of Congress known as the Hawaiian Homes Commission Act of 1920.

CHARLES, since deceased, was the maternal step-grandfather of Petitioner KAREN H. KAHALEWAI. On June 2, 1967, Grandfather Rodrigues, in accordance with the provisions of Section 209(1) of the Hawaiian Homes Commission Act, designated KAREN as his successor to the lease and improvements on Lot No. 22, Kalamaula, Molokai, and Lot No. 3, Moomoni, Molokai.

KAREN was 17 years old, having been



born on March 4, 1950. Her name was Karen Kahinu. Her occupation is listed as "Student, Molokai High School," and her percentage of Hawaiian blood is recorded as 75% therein.

The designation was approved by the DEPARTMENT OF HAWAIIAN HOME LANDS (hereinafter "DHHL") at the meeting held July 28, 1967. KAREN executed an agreement that appears as part of the designation,

" . . . to the naming of Mrs. Nancy Kahinu as my guardian should I succeed to the lease and improvements on Lot 22, Kalamaula, Molokai, and Lot 3, Moomomi, Molokai, before reaching majority."

When CHARLES designated KAREN as his successor, he was either 66 or 67 years old. He had no income other than Social Security and Welfare.

This designation of successor also involved an oral agreement by and between CHARLES with Nancy and KAREN that KAREN would perform work, labor and services for



CHARLES and live on the homestead with him.

KAREN performed all duties required of her under that agreement. She lived with her step-grandfather, did his laundry, cooked for him, took him on errands, read his mail, did the yard work, etc.

When KAREN went to Honolulu to school, Nancy substituted for her and did KAREN's work at CHARLES' homestead.

While KAREN was in Honolulu attending school, CHARLES became ill. He was hospitalized at Leahi in Honolulu. KAREN visited CHARLES and cared for him at Leahi. CHARLES had no visitors except KAREN. KAREN would shave CHARLES, check on his clothing and chewing tobacco; KAREN would write letters for CHARLES or read to him.

CHARLES could not read or write. He just knew how to sign his name.

After CHARLES was released from Leahi

Hospital, he lived with KAREN's mother, Nancy.

On May 9, 1970, KAREN married LEROY KAHALEWAI at St. George Catholic Church at Waimanalo, Hawaii.

LEROY was from Waimanalo and he was employed in Honolulu at the University of Hawaii.

After the marriage, KAREN returned to Molokai. CHARLES was still living with KAREN's mother. KAREN and CHARLES moved back to Lot 22 in Kalamaula and KAREN and CHARLES would go back to Nancy's house once in awhile. During this period of time (to August 1970), LEROY KAHALEWAI was working at the University of Hawaii and he lived in Honolulu.

LEROY did not want to move to Molokai. LEROY wanted to live in Honolulu since he had a job there and LEROY wanted to apply for a homestead here in Honolulu.

LEROY would visit KAREN on weekends

and stay with her and CHARLES. On those weekend visits, CHARLES convinced LEROY that LEROY could not get a homestead because his wife, KAREN, already had a homestead at Molokai. CHARLES told KAREN to stay in Molokai on Lot 22 because "that's her homestead."

CHARLES asked LEROY, "Why don't you just quit and come back to Molokai." However, LEROY was worried because there were no jobs on Molokai. CHARLES told LEROY he could fish and hunt and that he would help LEROY out and show him the things to do to help LEROY's family. At that time, KAREN and LEROY had one daughter born in Molokai.

KAREN and LEROY agreed. LEROY quit his job and moved to Molokai. CHARLES helped LEROY hunt and fish. They ate lots of venison and lots of fish.

When LEROY moved into the homestead, there was a four-bedroom home, but only

two of the bedrooms were in good condition. The building was termite-eaten. No one could occupy two of the bedrooms because of the flooring; you could see right through to the ground. The walls of the house had holes in them. You could see right through from the outside. The lumber was so termite-eaten and rotten, that when it rained, the water would come in from all over, above the windows, from the walls, and it was just a mess.

CHARLES fell through the floor twice. On one incident when CHARLES fell through the floor, KAREN was pregnant with her second child. She had to pull CHARLES out of the hole in the floor because his legs were stuck. He couldn't get out.

After CHARLES fell through the floor the second time, he and KAREN and LEROY began discussing building a new house. LEROY was going to build it because CHARLES had no money. CHARLES told LEROY

that this was KAREN's land and that LEROY would have to build a new house for his wife and children. The second child was born on October 16, 1971. By that time, LEROY had secured permanent employment, June 8, 1971, with Hawaiian Airlines.

In order to build a new house, the matter had to be processed through DHHL Commission. LEROY had to borrow money through DHHL because CHARLES could not. CHARLES, LEROY, KAREN, and NANCY went to the Hawaiian Homes Commission Office to see a Charles Meyers and arrange for the loan. Mr. Meyers was the Hawaiian Homes Commission Administrator on Molokai. The Administrator had a three-page document entitled, "Hawaiian Home Lands Contract of Loan No. 11328," prepared. This was executed on April 4, 1972 by CHARLES and LEROY. The loan was to replace the old home and it was previously approved by DHHL at its meeting held March 24, 1972.

At this meeting with Charles Meyers, LEROY and KAREN selected the house drawings. DHHL gave KAREN and LEROY two options: a three-bedroom or a four-bedroom house. CHARLES said he did not want anything to do with the selection of the house because it was going to be KAREN's home and she was to pick what she wanted. LEROY and KAREN selected the four-bedroom because CHARLES was going to live with them and they wanted CHARLES to have his own room too.

The Hawaiian Homes Commission gave LEROY and KAREN only one week to tear down the old house and prepare the site for the construction of the new home. LEROY had 16 people help him and KAREN raze the old building. He did not have money to pay for their services. LEROY had to pay in labor. He was still paying off that debt to the 16 people on July 9, 1979, when he testified. They worked 8 hours a day.

LEROY provided food for the workers and he borrowed his father-in-law's truck. The value of LEROY's time based on his hourly pay is \$8.64 per hour.

The new house was built by July 1, 1972. Before the new House was built, no one visited CHARLES. After the new house was built, ANTHONY, Thomas, Kalehua, and a lot of his friends visited him. Before the new house was built, CHARLES and Nancy and her husband, and KAREN were a very, very close family. LEROY and KAREN maintained a separate bedroom for CHARLES in the new home, made all the mortgage payments, paid all water (\$23 per month), electrical bills (\$50 per month), insurance, performed all the janitorial work, kept the buildings, including the new house in good repair, planted grass, flowers and mango trees, built sidewalks; KAREN bought and prepared CHARLES' food, and did his laundry and drove CHARLES to



the store or any place he wanted to go. CHARLES never paid KAREN for anything that she did for him; nor did he pay any money to share in the upkeep of the property.

LEROY had spent at least \$7,000.00 on the upkeep and repair of other buildings. CHARLES lived in the four-bedroom house from the time it was built until he was hospitalized in 1976.

In 1976, the Legal Aid Society began representing CHARLES against Nancy.

On August 3, 1976, CHARLES, without notice to LEROY or KAREN, executed a document with the Hawaiian Homes Commission designating ANTHONY as successor to Lots 22 and 3, Kalamaula and Hoolehua, Molokai. ANTHONY is a step-son of CHARLES and a brother of Nancy (KAREN's mother).

On August 3, 1976, the Hawaiian Homes Commission wrote to CHARLES with a carbon copy to LEROY. This informed LEROY and KAREN of the fact CHARLES had designated



ANTHONY and also that it would be "submitted to the Hawaiian Homes Commission for ratification" on August 27, 1976. KAREN requested to appear before the Hawaiian Homes Commission on August 27, 1976. Her request was approved unanimously. KAREN requested that she be named the successor to CHARLES and that if she could not be the successor, then the Commission decide what can be done about the money she had already put into the home. The Commission's response was that it could not deny CHARLES the right to name a successor,

" . . . unless the family determines that CHARLES is declared incompetent. Then the Court would name a guardian. It is your grandfather's right to name a successor; we cannot make a judgment. The family must take the action; not the Commission."

KAREN and LEROY brought an action in the First Circuit Court, State of Hawaii, against CHARLES, ANTHONY, and the State of

Hawaii, DHHL, on March 9, 1977. They sought to have the designation of ANTHONY declared null and void or the value of their work, labor and services and investments made be determined and that sum be awarded against CHARLES and ANTHONY. (Case No. 7781, Appendix "C".)

On August 25, 1977, CHARLES began this case in the Molokai Division of the District Court of the Second Circuit, State of Hawaii, seeking to summarily evict the KAHALEWAI family. The case was designated Civil No. Mo. 77-87.

The KAHALEWAI's then moved (First Circuit Court case) to enjoin this summary proceeding. Judge Arthur Fong in the First Circuit Court denied the motion to enjoin finding:

"7. Plaintiffs [KAHALEWAI's] have shown no likelihood of success on any claim for possession of Defendant Charles Rodrigues' Hawaiian Homes leasehold pursuant to the Hawaiian Homes Commission Act of 1920."

The KAHALEWAI's answered and counter-claimed and defended the summary possession action in the Molokai District Court and said court ruled that it did not have subject matter jurisdiction under Sec. 604-5, H.R.S., in that KAREN KAHALEWAI claimed an equitable interest in the title. Findings of Fact and Conclusions of Law and an Order Transferring Case to the Circuit Court of the Second Circuit were entered on November 30, 1977.

In the Second Circuit, CHARLES moved for summary possession and a dismissal of the counterclaim of the KAHALEWAI's. The Second Circuit granted summary possession to CHARLES and dismissed KAHALEWAI's counterclaim without prejudice. The court determined that as a matter of law, CHARLES was entitled as the sole lessee of the homestead property to present possession and that the KAHALEWAI's had no legal or equitable interest whatsoever.

The Second Circuit eviction case was appealed to the Hawaii Supreme Court and the Judgment of eviction was stayed pending appeal. The final judgment enforcing the eviction was entered November 7, 1983 (Appendix "E").

In the First Circuit Court, the case was resolved as stated in the first paragraph of Appendix "C":

"This action involves the construction of the Hawaiian Homes Commission Act, 1920, as amended (hereinafter HHCA). Plaintiffs Karen H. Kahalewai, nee Karen Kahinu (Karen), and Leroy Kahalewai (Leroy) (collectively plaintiffs) appeal basically from the orders dismissing defendants State of Hawaii Department of Hawaiian Home Lands (DHHL) and Anthony N. Rodrigues (Anthony) from the case, the order granting partial summary judgment in favor of defendant Charles Rodrigues, Charles, and the judgment awarding them \$12,616 against Charles. We affirm."

The money judgment to CHARLES is meaningless. He is dead. He was a pauper. He left no estate. His interest ceased upon his death and according to the decision and Sec. 208(5), HHCA, the lease-

hold is not subject to attachment, levy or sale upon court process.

The constitutional issues were raised at every stage of the proceedings. In the Second Circuit, 3/16/78, it was urged that:

"The summary possession has effectively confiscated the house and the property of the Defendants without any compensation whatsoever. This is a most unusual result in any court operating under Amendment XIV, particularly where the Plaintiff brought about the investments and expenditures by his designation of Karen Kahalewai as his successor and by his physical transfer or livery and seizen unto Karen and Leroy when he had them raze the old house and build their new one because it was Karen's. Section 208(5), HHCA, specifically permitted Plaintiff to transfer to, mortgage, pledge or otherwise hold for the benefit of a native Hawaiian or Hawaiians . . . "

#### REASONS FOR GRANTING THE WRIT

Congress intended this law to rehabilitate the Hawaiian race. It has helped prevent the extermination of the Hawaiian race. However, the facts in this case show that when an old Hawaiian lessee with

a drinking problem was too old and too poor to help himself and keep up the land and buildings, he rehabilitated himself and the leasehold by contracting with his step-granddaughter and also with her mother and still later her husband (all with the supervision of the Hawaiian Homes Commission). These were all Hawaiians of more than 50% Hawaiian blood. (Karen is 75% and Leroy is 100%.) They successfully rehabilitated themselves and the leasehold. They erected a new four-bedroom home. Four Hawaiian babies were born. Thereafter, when the old Lessee was 76 years old, he designated his step-son (ANTHONY RODRIGUES) as his successor to the leasehold. Three Justices of the Supreme Court of Hawaii have ruled that Congress intended to rehabilitate the Hawaiian race by giving to the old Lessee the absolute right to violate every contract and promise he made with the first

designated successor, her mother and her husband. Further, although the new home was built for the benefit of the four Hawaiian babies and their Hawaiian mother, the State has decreed they have no right to remain in that shelter.

The old man died a pauper and the State has given all of the property built and maintained by the first designated successor and her husband to ANTHONY, free and clear of any and all claims and the State evicted the young Hawaiian family from the leasehold.

It appears that the intention of Congress to rehabilitate the Hawaiian race has taken a legal detour in the State Court, without the consent of Congress and without any federal court reviewing the matter. It also appears that property has been confiscated for a federal use, the alleged rehabilitation of the Hawaiian race.

When Hawaii entered the Union, Hawaii and the United States entered into a compact that included among other things an agreement that, " . . . the qualifications of lessees shall not be changed except with the consent of the United States . . . ." (Admission Act, Sec. 4).

This case involves the qualifications of KAREN and LEROY as successor lessees pursuant to their contracts with the lessee and the Hawaiian Homes Commission.

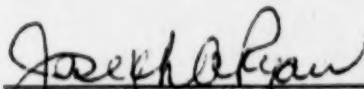
#### CONCLUSION

This Court should take this case because a majority of three Justices of any state court appears to be too local, too provincial, too limited in scope to construe and apply so important an Act of Congress as one dealing with the preservation of the Hawaiian race. The issues are national. The state courts are not equipped nor expected to fully comprehend national policies. As they have construed



and applied this Act of Congress, it has become a law of extermination rather than a law of rehabilitation.

DATED: Honolulu, Hawaii, December 22, 1983.



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APPENDIX "A"

NO. 6978

IN THE SUPREME COURT OF THE STATE OF  
HAWAII

OCTOBER TERM 1982

ANTHONY N.	)	CIVIL NO. 3571
RODRIGUES,	)	
	)	APPEAL FROM ORDER
Plaintiff-	)	GRANTING PLAIN-
Appellee,	)	TIFF'S MOTION FOR
	)	SUMMARY JUDGMENT
vs.	)	AND DISMISSING
	)	DEFENDANTS' COUN-
KAREN H. KAHALEWAI	)	TERCLAIM, FILED
and LEROY KAHALEWAI	)	MARCH 13, 1978;
	)	JUDGMENT FOR POS-
Defendants-	)	SESSION, FILED
Appellants.	)	APRIL 11, 1978;
<hr/>	)	ORDER DENYING
	)	MOTION FOR RECON-
	)	SIDERATION AND
	)	ALTERNATIVE MOTION
	)	FOR STAY OF EXECU-
	)	TION, FILED APRIL
	)	14, 1978; AND WRIT
	)	OF POSSESSION,
	)	FILED APRIL 26,
	)	1978

SECOND CIRCUIT  
COURT

HONORABLE KASE  
HIGA, Judge

MEMORANDUM OPINION\*

This is an appeal by Karen H.

Kahalewai and Leroy Kahalewai, defendants-appellants, from a judgment of possession of Lot 22A in Kalamaula, Molokai, covered in Hawaiian Homes Commission Residence Lot Lease No. 2367, entered by the Second Circuit Court in favor of Charles Rodrigues, now deceased.

Suggestion of death of Charles Rodrigues on September 4, 1980, was filed in this court on August 14, 1981, and substitution of Anthony N. Rodrigues, as plaintiff-appellee, was approved and allowed on September 16, 1981.

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\*Former Chief Justice Richardson, who heard oral argument in this case, retired from the court on December 30, 1982. Retired Justice Ogata, who also heard oral argument, was unable to continue on the case by reason of illness. HRS Sec. 602-10 (1982 Supp.) provides: "After oral argument of a case, if a vacancy arises or if for any other reason a justice is unable to continue on the case, the case may be decided or disposed of upon the concurrence of any three members of the court without filling the vacancy or the place of such justice."

Material facts in this case are identical with the facts in Karen H. Kahalewai and Leroy Kahalewai, plaintiffs-appellants, v. Charles Rodrigues, Anthony N. Rodrigues, and State of Hawaii Department of Hawaiian Home Lands, defendants-appellees, set forth in the opinion of the Intermediate Court of Appeals in Case No. 7781 filed on August 4, 1983, and reported in 4 Haw. App. \_\_\_, said Case No. 7781 being an appeal from a judgment of the First Circuit Court.

Those facts will not be repeated here, being incorporated herein by reference, inasmuch as the same are set forth in detail in the I.C.A. opinion mentioned above.

Likewise identical is the principal issue in this case, which, as stated in the I.C.A. opinion, is "whether, under the HHCA provisions, a lessee has the absolute right to change the designated successor

of his DHHL land lease to be effective upon the lessee's death."

That issue was answered in the affirmative by the Intermediate Court of Appeals in Case No. 7781. We agree with that answer.

Judgment of possession entered by the Second Circuit Court in favor of Charles Rodrigues is affirmed.

DATED: Honolulu, Hawaii, August 24, 1983.

/s/ Herman T.F. Lum  
/s/ Edward H. Nakamura  
/s/ Masaji Marumoto

APPENDIX "B"

NO. 6978

IN THE SUPREME COURT OF THE STATE OF  
HAWAII

OCTOBER TERM 1982

ANTHONY N.	)	CIVIL NO. 3571
RODRIGUES,	)	
	)	MOTION FOR
Plaintiff-	)	RECONSIDERATION
Appellee,	)	
	)	
vs.	)	
	)	
KAREN H. KAHALEWAI	)	
and LEROY KAHALEWAI	)	
	)	
Defendants-	)	
Appellants.	)	
	)	

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ORDER DENYING MOTION FOR  
RECONSIDERATION

The Motion for Reconsideration, filed  
on August 31, 1983, is hereby denied.

DATED: Honolulu, Hawaii, September  
14, 1983.

/s/ Herman T.F. Lum

/s/ Edward H. Nakamura

/s/ Masaji Marumoto

APPENDIX "C"

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE  
STATE OF HAWAII  
---o0o---

KAREN H. KAHALEWAI and LEROY KAHALEWAI,  
Plaintiffs - Appellants, vs. CHARLES  
RODRIGUES, ANTHONY N. RODRIGUES, and STATE  
OF HAWAII DEPARTMENT OF HAWAIIAN HOME  
LANDS, Defendants-Appellees

NO. 7781

APPEAL FROM FIRST CIRCUIT COURT

HONORABLE ARTHUR S.K. FONG, JUDGE  
HONORABLE RICHARD Y.C. AU, JUDGE

(CIVIL NO. 50956)

AUGUST 4, 1983

BURNS, C.J., HEEN AND TANAKA, JJ.

APPEAL AND ERROR - review - scope and  
extent in general.

An appeal from a final judgment brings  
up for review all interlocutory orders in  
the case not appealable directly as of  
right.

STATUTES - construction and operation -  
general rules of construction - in gen-  
eral.

Where there is no ambiguity in the  
language of the statute and the literal  
application of the language will not pro-  
duce an absurd or unjust result, the

statute must be given effect according to its plain and obvious meaning.

PUBLIC LANDS - disposal of lands of the states - Hawaii.

Under the Hawaiian Homes Commission Act (HHCA) Sec. 209(1), a lessee of the Department of Hawaiian Home Lands has the right to change the successor designated from among his relatives specified therein at any time. The designated successor's interest in the leased land vests only upon the lessee's death. A private agreement cannot alter such statutory provisions.

SAME - same - same.

To protect the lessee from an improvident action on his part, HHCA Sec. 208(5) requires the approval of the Department of Hawaiian Home Lands to alienate or encumber the lease or agree to do so.



OPINION OF THE COURT BY TANAKA, J.

This action involves the construction of the Hawaiian Homes Commission Act, 1920, as amended (hereinafter HHCA).<sup>1/</sup> Plaintiffs Karen H. Kahalewai, nee Karen Kahinu (Karen), and Leroy Kahalewai (Leroy) (collectively plaintiffs) appeal basically from the orders dismissing defendants State of Hawaii Department of Hawaiian Home Lands (DHHL) and Anthony N. Rodrigues (Anthony) from the case, the order granting partial summary judgment in favor of defendant Charles Rodrigues (Charles),<sup>2/</sup> and the judgment awarding them \$12,616 against Charles. We affirm.

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<sup>1/</sup> Hawaii Homes Commission Act, 1920; Act of July 9, 1921, ch. 42, 42 Stat. 108, reprinted in 1 Haw. Rev. Stat. 146 (1976) (HHCA).

<sup>2/</sup> On November 25, 1981, counsel for defendant-appellee Charles Rodrigues (Charles) filed a suggestion of death indicating his death on September 4,

The principal issue on appeal is whether, under the HHCA provisions, a lessee has the absolute right to change the designated successor of his DHHL land lease to be effective upon the lessee's death. We answer yes.

Charles, the lessee, was the holder of Hawaiian Home Lands General Lease No. 2367 (the lease) covering, inter alia Lot 22 in Kalamaula, Molokai. On June 2, 1967, pursuant to HHCA Sec. 209(1), Charles designated his granddaughter Karen as successor to the lease and the Hawaiian Homes Commission (Commission)3/

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1980. There has been no substitution for the deceased Charles on appeal. However, counsel for deceased Charles filed an answering brief on February 25, 1982 and the designated successor of Charles, Anthony N. Rodrigues, is a defendant-appellee in the case.

3/ The Hawaiian Homes Commission, composed of seven members appointed by the governor with the advice and consent of the senate, heads the Department of Hawaiian Home Lands (DHHL). See HHCA Sec. 202 (1976).

approved such designation on July 28, 1967. At that time, Charles was 66 or 67 years of age. Karen claims that the designation was made pursuant to an agreement with Charles that she would look after him and maintain and care for Lot 22 and its improvements.

On May 9, 1970, plaintiffs were married. In August 1970, Leroy moved from Honolulu to join Karen and Charles on Lot 22. Plaintiffs claim that Charles induced them to demolish the old house on Lot 22 and build a new 4-bedroom home. They acquiesced because Charles assured them that Karen was the successor to the lease. As evidenced by Hawaiian Home Lands Contract of Loan No. 11328 dated April 4, 1972, Charles borrowed \$18,000 from the Hawaiian Home Loan Fund for the purpose of replacing the house on Lot 22. The contract provided for interest at 7 1/2% per annum and repayment in monthly

installments of \$152. Leroy's signature appears on the contract, although it is not clear in what capacity he signed the document.

The new house on Lot 22 was completed in July 1972. Plaintiffs claim that they have been repaying the loan at the rate of \$152 each month.

On May 18, 1976, Charles designated Anthony as successor of the lease which was approved by the chairman of the Commission on August 3, 1976. Despite Karen's objection, the Commission ratified the chairman's approval on October 29, 1976.

On March 9, 1977, plaintiffs filed a complaint seeking to have the designation of Anthony as successor declared null and void or, in the alternative, to be awarded monetary damages.

The trial court, in its order of April 29, 1977 (April 29th Order),

granted DHHL's motion to dismiss. On May 25, 1979, the Court entered its order (May 25th Order) granting Anthony's motion to dismiss or, in the alternative, for summary judgment and dismissed the complaint with prejudice as to him.

On the same day, the court entered its findings of fact, conclusions of law, and order (May 25th Findings, Conclusions, and Order) granting Charles partial summary judgment concerning (1) the issue of Charles' "redesignation" of Anthony as his successor to the lease and (2) the issue that plaintiffs had no interest in the lease. The order specified that the only issue left was whether Charles perpetrated fraud or misrepresentation upon plaintiffs. After a bench trial, the court in its findings of fact, conclusions of law, and order filed on October 23, 1979 (October 23rd Findings, Conclusions, and Order) (1) dismissed

plaintiffs' claims based on fraud and undue influence, (2) concluded that Charles was indebted to plaintiffs on the theory of unjust enrichment, and (3) permitted plaintiffs to amend their complaint to conform to the evidence. On November 26, 1979, judgment was entered accordingly and plaintiffs' appeal followed.<sup>4/</sup>

I.

At the outset we address the question of whether we have jurisdiction to review all of the grounds of appeal specified in plaintiffs' opening brief. In their notice of appeal, plaintiffs state that

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<sup>4/</sup> Charles cross-appealed. On November 27, 1981, however, the cross-appeal was withdrawn.

No disposition of Charles' counter-claims was made in the court below. After we temporarily remanded the case, the trial court entered its nunc pro tunc Rule 54(b), Hawaii Rules of Civil Procedure (HRCPP) (1981), certification of judgment.

they appeal "from the final Judgment entered herein on November 26, 1979, and from each and every part thereof." Both Charles and Anthony contend that since plaintiffs failed to specify in the notice of appeal the May 25th Findings, Conclusions, and Order and the May 25th Order, we lack jurisdiction to review them. We disagree.

Our supreme court has held that an appeal from a final judgment brings up for review all interlocutory orders which deal with the issues in the case not appealable directly as of right. Pioneer Mill Co. v. Ward, 34 Haw. 686 (1938). See also City & County v. Midkiff, 57 Haw. 273, 554 P.2d 233 (1976); Lussier v. Mau-Van Development, Inc., 4 Haw. App. --- (No. 8309, July 21, 1983); Munoz v. Small Business Administration, 644 F.2d 1361 (9th Cir. 1981).



## II.

Hawaiian Homes Commission Act Secs. 208(5) and 209(1) are dispositive of the appeal from the April 29th Order, May 25th Order, and the May 25th Findings, Conclusions, and Order. HHCA Sec. 208(5) (1976) states:

"The lessee shall not in any manner transfer to, or mortgage, pledge, or otherwise hold for the benefit of, any person or group of persons or organizations of any kind, except a native Hawaiian or Hawaiians, and then only upon the approval of the department, or agree so to transfer, mortgage, pledge, or otherwise hold, his interest in the tract. Such interest shall not, except in pursuance of such a transfer, mortgage, or pledge to or holding for or agreement with a native Hawaiian or Hawaiians approved of by the department, or for any indebtedness due the department or for taxes, or for any other indebtedness the payment of which has been assured by the department, including loans from governmental agencies where such loans have been approved by the department, be subject to attachment, levy, or sale upon court process. The lessee shall not sublet his interest in the tract or improvements thereon." [Emphasis added.]

The pertinent part of HHCA Sec. 209(1) (1976) provides:

"Upon the death of the lessee, his interest in the tract or tracts and the improvements thereon, including growing crops . . . shall vest in the relatives of the decedent as provided in this paragraph. From the following relatives of the lessee, husband and wife, children, widows or widowers of the children, grandchildren, brothers and sisters, widows or widowers of the brothers and sisters, or nieces and nephews, the lessee shall designate the person or persons to whom he directs his interest in the tract or tracts to vest upon his death. Such person or persons must be qualified to be a lessee of Hawaiian home lands . . . . Such designation must be in writing, must be specified at the time of execution of such lease with a right in such lessee in similar manner to change such beneficiary at any time and shall be filed with the department and approved by the department in order to be effective to vest such interests in the successor or successors so named." [Emphasis added.]

A.

Our supreme court has reiterated that "where there is no ambiguity in the language of a statute, and the literal application of the language would not produce an absurd or unjust result, clearly inconsistent with the purposes and policies of the statute, there is no

room for judicial construction and interpretation, and the statute must be given effect according to its plain and obvious meaning." In re Palk, 56 Haw. 492, 497, 542 P.2d 361, 364 (1975) (quoting State v. Park, 55 Haw. 610, 525 P.2d 586 [1974]). See also Sherman v. Sawyer, 63 Haw. 55, 621 P.2d 346 (1980); In re Spencer, 60 Haw. 497, 591 P.2d 611 (1979).

Applying the foregoing precept, we find that the language of HHCA Sec. 209(1) is "plain and unmistakable" and we are "bound by the plain, clear and unambiguous language" therein. In re Grayco Land Escrow, Ltd., 57 Haw. 436, 455, 559 P.2d 264, 277 (1977), cert. denied, 433 U.S. 910, 97 S.Ct. 2976-77, 53 L.Ed.2d 1094 (1977). HHCA Sec. 209(1) unequivocally (1) grants to the lessee the right to designate the successor to his lease from among his relatives speci-

fied therein, (2) provides that such designation will vest the lessee's interest in the lease upon his death, (3) requires the designation to be in writing and filed with and approved by DHHL, and (4) states that the lessee has the right to change such designated beneficiary at any time.

Here, Charles met all of the requirements of HHCA Sec. 209(1) and effectively changed the designated beneficiary of or successor to his lease from Karen to Anthony.

Karen argues that Charles' designation of her as the successor to the lease became irrevocable upon her rendering the services she agreed to perform for Charles. We cannot agree since HHCA Sec. 209(1) clearly indicates that a lessee has a right to change the designated successor at any time and the designated successor's interest in the leased

land vests only upon the lessee's death. A private agreement cannot alter the plain language and import of HHCA Sec. 209(1).

B.

Plaintiffs advance the novel argument that (1) despite HHCA Sec. 209(1), HHCA Sec. 208(5) permits the transfer or agreement to transfer Charles' interest in the land to a native Hawaiian or Hawaiians<sup>5/</sup> upon the approval of DHHL; (2) plaintiffs are native Hawaiians; (3) Charles agreed to transfer the lease to plaintiffs in consideration of plaintiffs' promise to demolish the old house and pay for the construction of a new house, which plaintiffs have fulfilled or are in the process of fulfilling; (4)

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<sup>5/</sup> HHCA Sec. 201(7) (1976) defines the term "native Hawaiian" to mean "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."

DHHL approved the transaction when it permitted Leroy to "borrow" \$18,000 and signed the April 4, 1972 Contract of Loan; and (5) consequently, there was an agreement to transfer the lease to plaintiffs and the designation of Anthony as successor was ineffective and null and void. The argument fails to sway us.

Like the language of HHCA Sec. 209(1), the language of HHCA Sec. 208(5) is plain, clear, and unambiguous. It explicitly provides that the lessee "shall not in any manner" transfer or agree to transfer the lease to anyone, except to "a native Hawaiian or Hawaiians, and then only upon the approval" of DHHL.

The enactment of the HHCA by the federal government was in response to the plight of the native Hawaiians. Its purpose was to place them upon the land to insure their rehabilitation. See In

re Ainoa, 60 Haw. 487, 591 P.2d 607 (1979); N. Levy, Native Hawaiian Land Rights, 63 Cal. L. Rev. 848 (1975). By the enactment of the HHCA, the federal government undertook "a trust obligation benefiting the aboriginal people" and the State of Hawaii has now assumed such fiduciary obligation. Ahuna v. Dept. of Hawaiian Home Lands, 64 Haw. 327, 338, 640 P.2d 1161, 1168 (1982).

To protect the lessee from improvidently alienating or encumbering the lease, HHCA Sec. 208(5) explicitly provides how such alienation or encumbrance can be effectuated and unequivocally states that the lease shall not "be subject to attachment, levy, or sale upon court process." In the best interest of the lessee, the fiduciary duty of approving or disapproving the alienation or encumbrance of the lease or an agreement to do so is imposed on DHHL.



We hold that plaintiffs failed to meet the requirements of HHCA Sec. 208(5) to effect an agreement with Charles to transfer the lease to them. There was no DHHL approval for the alleged agreement to transfer. The April 4, 1972 Contract of Loan cannot be deemed the requisite approval. It merely evidenced the loan made by DHHL pursuant to HHCA Secs. 214 and 215, which authorize DHHL to make loans to lessees and set forth the conditions of such loans.

C.

The trial court, as a matter of law, properly ruled in favor of DHHL<sup>6/</sup>,

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<sup>6/</sup> The trial court should have treated the motion to dismiss made by DHHL pursuant to Rule 12(b)(6), HRCPC (1981), as a Rule 56, HRCPC (1981), motion since an affidavit and exhibits were attached to the motion and were considered by the court. See Towse v. State, 64 Haw. 624, 647 P.2d 696 (1982); Au v. Au, 63 Haw. 210, 626 P.2d 173 (1981); Rosa v. CWJ Contractors, Ltd.,

Anthony, and Charles on the principal issue of whether Charles could and did effectively change the designated sucesor of his lease to Anthony.

### III.

Plaintiffs also contend that certain findings contained in the May 25th Findings, Conclusions, and Order and in the October 23d Findings, Conclusions, and Order, on which the judgment was based, were clearly erroneous and that the award of \$12,616 was inadequate.

We have reviewed the available record 7/ and find that there is substantial

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4 Haw. App. \_\_\_\_ (No. 8584, May 18, 1983). We view the April 29, 1977 order granting the motion to dismiss as an order granting summary judgment to DHHL. See Gonsalves v. First Insurance Co., 55 Haw. 155, 516 P.2d 720 (1973). Viewed thusly, there was no genuine issue of material fact and DHHL was entitled to a judgment as a matter of law. See Kainz v. Lussier, 4 Haw.App. \_\_\_\_ (Nos. 8520 and 8521, July 22, 1983).

7/ The bench trial was held on July

evidence to support the trial court's findings. See Shoemaker v. Takai, 57 Haw. 599, 561 P.2d 1286 (1977); Henmi Apartments, Inc. v. Sawyer, 3 Haw. App. 555, 655 P.2d 881 (1982). Furthermore, the review does not leave us with the definite and firm conviction that a mistake has been made. Kim v. State, 62 Haw. 483, 616 P.2d 1376 (1980); Stewart v. Smith, 4 Haw. App. \_\_\_\_ (No. 8660, May 10, 1983).

Affirmed.

/s/ James S. Burns  
/s/ Walter M. Heen  
/s/ Harry T. Tanaka

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Eugene L. Sabada  
CLERK INTERMEDIATE  
COURT OF APPEALS

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9 and August 10, 1979. The court reporter relocated to the mainland United States and there is no transcript of the August 10, 1979 proceeding. However, the record includes Rule 75(c), HRCF (1981), statements of the evidence and proceedings of plaintiffs, Charles, and the trial judge.

APPENDIX "D"

NO. 7781

IN THE SUPREME COURT OF THE STATE OF  
HAWAII

OCTOBER TERM 1982

KAREN H. KAHALEWAI	)	CIVIL NO. 50965
and LEROY KAHALEWAI	)	
	)	APPLICATION FOR
Petitioners-	)	WRIT OF CERTIO-
Appellants,	)	RARI
	)	
vs.	)	INTERMEDIATE COURT
	)	OF APPEALS
CHARLES RODRIGUES,	)	
ANTHONY N. RODRIGUES	)	HONORABLE JAMES S.
and STATE OF HAWAII	)	BURNS, WALTER M.
DEPARTMENT OF	)	HEEN and HARRY T.
HAWAIIAN HOME LANDS,	)	TANAKA, JUDGES
	)	
Respondents-	)	
Appellees.	)	

---

ORDER

The Application for Writ of Certiorari  
is hereby denied.

DATED: Honolulu, Hawaii, September 7,  
1983.

FOR THE COURT:

/s/ Herman T.F. Lum (Seal)  
Chief Justice

APPENDIX "E"

NO. 6978

IN THE SUPREME COURT OF THE STATE OF  
HAWAII

OCTOBER TERM 1982

ANTHONY N.	)	CIVIL NO. 3571
RODRIGUES,	)	
	)	APPEAL FROM ORDER
Plaintiff-	)	GRANTING PLAIN-
Appellee,	)	TIFF'S MOTION FOR
	)	SUMMARY JUDGMENT
vs.	)	AND DISMISSING
	)	DEFENDANTS' COUN-
KAREN H. KAHALEWAI	)	TERCLAIM, FILED
and LEROY KAHALEWAI	)	MARCH 13, 1978;
	)	JUDGMENT FOR POS-
Defendants-	)	SESSION, FILED
Appellants.	)	APRIL 11, 1978;
	)	ORDER DENYING
	)	MOTION FOR RECON-
	)	SIDERATION AND
	)	ALTERNATIVE MOTION
	)	FOR STAY OF EXECU-
	)	TION, FILED APRIL
	)	14, 1978; AND WRIT
	)	OF POSSESSION,
	)	FILED APRIL 26,
	)	1978

SECOND CIRCUIT  
COURT

HONORABLE KASE  
HIGA, Judge

JUDGMENT ON APPEAL

Pursuant to the memorandum opinion of

the Court filed on August 24, 1983, the Judgment of Possession entered by the Second Circuit Court in favor of Charles Rodrigues is affirmed.

DATED: Honolulu, Hawaii, Nov. 7, 1983.

BY THE COURT:

/s/ Eugene L. Sabado

APPROVED:

/s/ Herman T.F. Lum (Seal)  
CHIEF JUSTICE OF THE  
SUPREME COURT

## **APPENDIX "F"**

### **CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED**

#### **United States Constitution**

**AMENDMENT V.** No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

**AMENDMENT XIII.** Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

**AMENDMENT XIV.** Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

#### **Hawaii Admission Act**

(Act of March 18, 1959, Pub. L. 86-3, 73 Stat. 4)

**Section 4.** As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the



United States, and in no other manner; provided, That (1) sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits of lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act.

### Hawaii Constitution

#### ARTICLE XI. HAWAIIAN HOME LANDS.

Section 1. Hawaiian Homes Commission Act. Anything in this constitution to the contrary notwithstanding, the Hawaiian Homes Commission Act, 1920, enacted by the Congress, as the same has been or may be amended prior to the admission of the

State, is hereby adopted as a law of the State, subject to amendment or repeal by the legislature, provided, that, if and to the extent that the United States shall so require said law shall be subject to amendment or repeal only with the consent of the United States and in no other manner, provided, further, that, if the United States shall have been provided or shall provide that particular provisions or types of provisions of said Act may be amended in the manner required for ordinary state legislation, such provisions or types of provisions may be so amended. The proceeds and income from Hawaiian home lands shall be used only in accordance with the terms of said Act, and the legislature may, from time to time, make additional sums available for the purposes of said Act by appropriating the same in the manner provided by law.

**Section 2. Compact with the United States.** The State and its people do hereby accept, as a compact with the United States, or as conditions or trust provisions imposed by the United States, relating to the management and disposition of the Hawaiian home lands, the requirement that Section 1 hereof be included in this constitution, in whole or in part, it being intended that the Act or Acts of Congress pertaining thereto shall be definitive of the extent and nature of such compact, conditions or trust provisions, as the case may be. The State and its people do further agree and declare that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out.

**Section 3. Amendment and Repeal.** As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of [this] State, as provided in Section 7, subsection (b) of [the Admission Act], subject to amendment or repeal only with the consent of the United States, and in no other manner. Provided, that (1) sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits of lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act.

**Section 208. Conditions of leases.**  
Each lease made under the authority granted the department by the provisions of section 207 of this title, and the tract in respect to which the lease is made, shall be deemed subject to the following conditions, whether or not stipulated in the lease:

(5) The lessee shall not in any manner transfer to, or mortgage, pledge, or otherwise hold for the benefit of, any other person or group of persons or organizations of any kind, except a native Hawaiian or Hawaiians, and then only upon the approval of the department, or agree so to transfer, mortgage, pledge, or otherwise hold, his interest in the tract. Such interest shall not, except in pursuance of such a transfer, mortgage, or pledge to or holding for or agreement with a native Hawaiian or Hawaiians approved of by the department, or for any indebtedness due the department or for taxes, or for any other indebtedness the payment of which has been assured by the department, including loans from governmental agencies where such loans have been approved by the department, be subject to attachment, levy, or sale upon court process. The lessee shall not sublet his interest in the tract or improvements thereon.

**Section 209. [Successors to lessees.]** (1) Upon the death of the lessee, his interest in the tract or tracts and the improvements thereon, including growing crops (either on the tract or in any collective contract or program to which the lessee is a party by virtue of his interest in the tract or tracts), shall vest in the relatives of the decedent as provided in this paragraph. From

the following relatives of the lessee, husband and wife, children, widows or widowers of the children, grandchildren, brothers and sisters, widows or widowers of the brothers and sisters, or nieces and nephews,--the lessee shall designate the person or persons to whom he directs his interest in the tract or tracts to vest upon his death. Such person or persons must be qualified to be a lessee of Hawaiian home lands; provided, that Hawaiian blood requirements shall not apply to the descendants of those who are not native Hawaiians but who were entitled to the leased lands under the provisions of section 3 of the Act of May 16, 1934 (48 Stat. 777, 779), as amended; provided, further, that such person or persons need not be twenty-one years of age. Such designation must be in writing, must be specified at the time of execution of such lease with a right in such lessee in similar manner to change such beneficiary at any time and shall be filed with the department and approved by the department in order to be effective to vest such interests in the successor or successors so named. . . .

**Section 214. Loans, purposes of.** The department is hereby authorized to make loans from revolving funds to the lessee of any tract, the successor to his interest therein or any agricultural cooperative association all of whose members are lessees. Such loans may be made for the following purposes:

(1) The repair or maintenance or purchase or erection of dwellings on any tract and the undertaking of other permanent improvements thereon; . . .



### Section 215. Conditions of loans.

Except as otherwise provided in section 213(i), each contract of loan with the lessee or any successor or successors to his interest in the tract or with any agricultural or mercantile cooperative association composed entirely of lessees shall be held subject to the following conditions whether or not stipulated in the contract loan:

(1) At any one time, the outstanding amount of loans made to any lessee, or successor or successors in interest, for the repair, maintenance, purchase, and erection of a dwelling and related permanent improvements shall not exceed \$35,000, for the development and operation of a farm or a ranch shall not exceed \$35,000, except that when loans are made to an agricultural cooperative association for the purposes stated in paragraph (4) of section 214, the loan limit shall be determined by the department on the basis of the proposed operations and the available security of the association, and for the development and operation of a mercantile establishment shall not exceed the loan limit determined by the department on the basis of the proposed operations and the available security of the lessee or of the organization formed and controlled by lessees; provided, that where, upon the death of a lessee leaving no relative qualified to be a lessee of Hawaiian home lands, or the cancellation of a lease by the department, or the surrender of a lease by the lessee, the department shall make the payment provided for by section 209(1), the amount of any such payment made to the legal representative of the deceased lessee, or to the previous lessee, as the case may be, shall be consi-

dered as part or all, as the case may be, of any such loan to the successor or successors, without limitation as to the above maximum amounts; provided, further, that in case of the death of a lessee, or cancellation of a lease by the department, or the surrender of a lease by the lessee, the successor or successors to the tract shall assume any outstanding loan or loans thereon, if any, without limitation as to the above maximum amounts but subject to paragraph (3) of this section.

#### Statute

42 USC, Section 1994. Peonage abolished. The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void.



FILED

APR 24 1984

NO. 83-1299

IN THE  
SUPREME COURT OF THE UNITED STATES

ALEXANDER L. STEVENS

October Term 1983

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ANTHONY N. RODRIGUES,  
Respondent,

vs.

KAREN H. KAHALEWAI and  
LEROY KAHALEWAI,  
PETITIONERS.

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BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

---

TANY S. HONG  
Attorney General  
State of Hawaii  
EDWIN P. WATSON  
GEORGE K. K. KAEAO, JR.  
Deputies Attorney General  
State of Hawaii  
Attorneys for State  
Defendants

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term 1983

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ANTHONY N. RODRIGUES,

Respondent,

vs.

KAREN H. KAHALEWAI  
and LEROY KAHALEWAI,

Petitioners.

---

BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

I. INTRODUCTION

This matter involves no federal question. It arises out of a family dispute. All parties involved in these litigations are native Hawaiians (beneficiaries under the Hawaiian Homes Commission Act, 1920, as amended, Act of July 9, 1921, ch. 42, 42 Stat. 108, hereafter HHCA) except the Department of Hawaiian Home Lands.<sup>1/</sup>

---

1/ The Department of Hawaiian Home Lands is the state agency established to administer the provisions of the HHCA and is

In 1921, Congress enacted the HHCA which created the Hawaiian Homes Commission (HHC)<sup>2/</sup> and designated some 200,000 acres (the Hawaiian home lands) for the welfare and rehabilitation of native Hawaiians. The HHCA empowered the HHC to lease parcels of land within its jurisdiction to native Hawaiians at nominal rates.

The purpose of the HHCA is to rehabilitate native Hawaiians on Hawaiian home lands. In Re Aiona, 60 Haw. 487, 488, 591 P.2d 607 (1979). See also Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 588 F.2d 1216, 1218 (1978), cert. den. 444 U.S. 826 (1979); and N. Levy, Native Hawaiian Land Rights, 63 Cal. L. Rev. 848, 865-66, 876-80 (1975).

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headed by the Hawaiian Homes Commission (Commission), now composed of eight members appointed by the governor with the advice and consent of the senate. See Hawaii Revised Statutes (HRS) §§ 26-4(13) and 26-17; and HHCA § 202(a).

2/ Upon admission, the HHC as then established was abolished and the DHHL formed to carry out its functions. HRS § 26-24.

With the admission of Hawaii into the Union in 1959, responsibility for the administration of the Hawaiian Home Lands was transferred to the state. The Hawaiian Admission Act, Pub. L. 86-3, 73 Stat. 5 (1959) conveyed the United States' title to the Hawaiian home lands to the state, at § 5(b), and requires Hawaii to hold these lands "as a public trust . . . for the betterment of the conditions of native Hawaiians . . . and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States," at § 5(f). See Keaukaha-Panaewa, supra, at 1218.

By the enactment of the HHCA, the federal government undertook "a trust obligation benefiting the aboriginal people" and the state has now assumed such fiduciary obligation. Ahuna v. Department of Hawaiian Home Lands, 64 Haw. 327, 338, 640 P.2d 1161, 1168 (1982). The Ninth Circuit similarly opined stating:



The Commission Act, as originally enacted, created certain benefits for native Hawaiians. It is clear, however, that for all practical purposes these benefits have lost their federal nature. Upon admission of Hawaii into the Union, the entire Commission Act program was turned over to the State of Hawaii. The United States conveyed its interest in the home lands (which are the subject of the Commission Act) to the state and these lands are now administered by state officials. The Commission Act itself was deleted from the United States Code and, at Congress' insistence, was adopted as a permanent fixture of the state's constitution. Thus, it is undisputable that the Commission Act program together with its rights and duties are, for all practical purposes, elements of Hawaiian law. (Emphasis added.)

Keaukaha-Panaewa, supra, at p. 1226.

Thus, as is clear from the foregoing, the HHCA is now state law and has been "adopted as a permanent fixture of the state's constitution." Hawaiian home lands are lands held in trust by the state for the benefit of native Hawaiians to be used in the manner and for the purposes specified in the HHCA.

The issue involved in this case is the proper construction of the HHCA provisions.

## II. STATEMENT OF THE CASE

Charles Rodrigues (Charles), the lessee, was a holder of a Hawaiian home lands Lease No. 2367 (the lease) covering, inter alia, Lot 22, in Kalamaula, island of Molokai. On June 2, 1967, pursuant to HHCA § 209(1), Charles designated his 17 year old granddaughter Karen Kahalewai, nee Kahinu (Karen) as successor to the lease and the Commission approved such designation on July 28, 1967. Charles was then 66 or 67 years of age. Karen claimed that the designation was made pursuant to an agreement with Charles that she would look after him and maintain and care for Lot 22 and its improvements.

On May 9, 1970, Karen and Leroy Kahalewai (Leroy) were married in Honolulu. After the marriage, Karen returned to Molokai and was joined later by Leroy in August 1970.

Karen and Leroy (Petitioners) claim that Charles induced them to demolish the old house on Lot 22 and to build a new four-bedroom home. They acquiesced because

Charles assured them that Karen was the successor to the lease. Charles borrowed \$18,000 from the Hawaiian Home Loan Fund for the purpose of replacing the house on Lot 22 as evidenced by Hawaiian Home Lands Contract of Loan No. 11328 dated April 4, 1972. The loan contract provided for interest at 7-1/2% per annum and repayment in monthly installments of \$152. Leroy's signature appears on the loan contract, although it is not clear in what capacity he signed the document.

The new house on Lot 22 was completed in July 1972. Petitioners claim they have been repaying the loan at the rate of \$152 each month.

On May 18, 1976, Charles designated Anthony Rodrigues (Anthony) as successor to the lease which was approved by the chairman of the Commission on August 3, 1976. Despite Karen's objections, the Commission ratified the chairman's approval on October 29, 1976.

On March 9, 1977, Petitioners filed a complaint in the First Circuit<sup>3/</sup> against Charles, Anthony, State of Hawaii and DHHL seeking to have the designation of Anthony as successor declared null and void or, in the alternative, to be awarded monetary damages (Civil No. 50956).

On March 31, 1977, DHHL and the State moved to dismiss as to them on the grounds that the complaint failed to state a claim upon which relief could be granted. DHHL contended that HHCA § 209(1) clearly

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3/ Pursuant to HRS § 603-1, the State is divided into four judicial circuits as follows:

§ 603-1 Judicial circuits. The State is divided into four judicial circuits as follows:

- (1) The first judicial circuit is the island of Oahu and all other islands belonging to the State not hereinafter mentioned, and the district of Kalawao on the island of Molokai;
- (2) The second judicial circuit includes the islands of Maui, Molokai (except the Kalawao district), Lanai, Kahoolawe, and Molokini;
- (3) The third judicial circuit is the island of Hawaii;
- (4) The fifth judicial circuit includes the island of Kauai and Niihau.

indicates that approval of a designation of successor is a ministerial act and thereunder the lessee has an absolute right to designate a successor and to change such designation at any time. Indeed it was further urged that if all the stated contingencies required under § 209(1) were met, approval was mandated by law and liability could attach for failure to perform in the prescribed manner.

On April 29, 1977, the First Circuit trial court entered its order granting DHHL's motion to dismiss.

On August 25, 1977, Charles filed a summary possession action in the District Court of the Second Circuit against Karen and Leroy. In defense, Petitioners claimed equitable title. The district court dismissed in view of its jurisdictional limitation when title to real estate comes into question.<sup>4/</sup>

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4/ HRS § 604-5(e) provides as follows:

(e) The district courts shall not have cognizance of real actions, nor actions in which the title to real estate comes in

The matter was therefore refiled in the Second Circuit Court for further handling (Civil No. 3571).

On March 13, 1978, the Second Circuit trial court entered its order granting Charles' motion for summary judgment and dismissing Petitioners' counterclaim and on April 11, 1978 filed its judgment for possession in favor of Charles. Petitioners' motion for reconsideration and alternative motion for stay of execution was denied by the Second Circuit trial court on April 14, 1978 after which it issued a Writ of Possession on April 26, 1978. Petitioners appealed (Case No. 6978).

On May 25, 1979, the First Circuit trial court, in Civil No. 50596, entered its order granting Anthony's motion to dismiss or, in the alternative, for summary judgment and

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question, nor actions for libel, slander, defamation of character, malicious prosecution, false imprisonment, breach of promise of marriage, or seduction; nor shall they have power to appoint referees in any cause.



dismissed the complaint with prejudice as to Anthony.

Also on May 25, the First Circuit trial court entered its findings of fact, conclusions of law, and order granting Charles partial summary judgment concerning (1) the issue of Charles' "redesignation" of Anthony as his successor to the lease and (2) the issue that Petitioners had no interest in the lease. The order specified that the only issue left was whether Charles perpetrated fraud or misrepresentation upon Petitioners. After a bench trial, the trial court, in its findings of fact, conclusions of law, and order filed on October 23, 1979, dismissed Petitioners' claim based on fraud and undue influence, concluded that Charles was indebted to Petitioners on the theory of unjust enrichment, and permitted Petitioners to amend their complaint to conform to the evidence. Judgment was entered November 26, 1979 awarding Petitioners \$12,616 against Charles. Petitioners appealed therefrom (Case No. 7781).



Charles died September 4, 1980<sup>5/</sup> and Anthony, pursuant to the last designation of Charles on May 18, 1976, approved by the Chairman of the Commission on August 3, 1976 and ratified by the Commission on October 29, 1976, succeeded to Charles' interest in Lease No. 2367 by operation of law.

In Case No. 7781, the State Intermediate Court of Appeals entered its opinion on August 4, 1983 affirming the actions of the First Circuit trial court. From a denial of their motion for reconsideration, Petitioners applied for writ of ~~habeas~~ <sup>habeas</sup> ~~corporari~~ <sup>corporari</sup> which was denied by the Hawaii Supreme Court September 7, 1983. Judgment was thereafter entered.

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5/ Suggestion of death of Charles was filed in Case No. 6978 on August 14, 1981 and substitution of Anthony was approved and allowed on September 16, 1981. However, in Case No. 7781, though suggestion of death of Charles was filed November 25, 1981, there was no substitution for Charles in their appeal. However, counsel for Charles nonetheless filed an answering brief on February 25, 1982 and Anthony was a defendant-appellee in the case and also filed an answering brief.

In Case No. 6978, the State Supreme Court, in its Opinion rendered August 24, 1983, determined that the material facts in this case were identical to that set forth in the opinion of the Intermediate Court of Appeals filed August 4, 1983 and reported in 4 Haw. \_\_\_\_, Case No. 7781. Likewise, it determined the principal issue to be identical and agreed with the determination of the Intermediate Court of Appeals in Case No. 7781. A motion for reconsideration was filed on August 31, 1983 and denied by the State Supreme Court on September 14, 1983. On November 7, 1983, the Supreme Court entered its Judgment on Appeal affirming the judgment of possession entered by the Second Circuit Court in favor of Charles.

This petition for writ of certiorari ensued.

### III. COUNTERSTATEMENT OF QUESTIONS PRESENTED

Did the State Intermediate Court of Appeals (Case No. 7781) and the State Supreme Court (Case No. 6978) err in determining that

under the HHCA provisions, a lessee has the absolute right to change at any time, the designated successor of his DHHL land lease to be effective upon the lessee's death?

Is there a federal question involved in the disposition of this case?

#### IV. REASONS FOR DISALLOWANCE OF THE WRIT

The State Intermediate Court of Appeals (Case No. 7781) and the State Supreme Court (Case No. 6978) did not err in determining that, under the HHCA provisions, the lessee has the absolute right to change the designated successor of his DHHL land lease to be effective upon the lessee's death.

There is no federal question involved in the disposition of this case.

#### V. ARGUMENT

##### A. Response to Petitioners Questions Presented.

- i. There is no change of qualification of lessees as alleged.

Counsel for Petitioners first queries whether Sections 208(5) and 209(1) of the HHCA, as construed and applied by the Hawaii

Supreme Court, violate the compact between Hawaii and the United States that the qualifications of lessees shall not be changed except with the consent of the United States? Its sole argument is that "This case involves the qualifications of Karen and Leroy as successor lessees pursuant to their contracts with the lessee and the Hawaiian Homes Commission." (Page 27 of Petition.) (Emphasis added.)

Section 4 of the Admission Act provides in pertinent part as follows:

Section 4. As a compact with the United States relating to the management and disposition of Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State . . . subject to amendment or repeal only with the consent of the United States, and in no other manner; provided, . . . (2) that any amendment to increase the benefits of lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States. . . .

Under the HHCA, only native Hawaiians as defined in Section 201(7) are eligible to participate in this homesteading program

designed by Congress to rehabilitate the aboriginal people. As previously noted, Charles, Karen, Leroy and Anthony are all native Hawaiians.

This case in no way seeks to change the qualifications of lessees. The only question was who was legally entitled to succeed to Charles' lease, Karen or Anthony. Based on the facts and the applicable provisions of the HHCA, it was properly determined that Anthony is the legal successor.

Section 209(1) provides that the lessee has the right to designate a person from among the enumerated list of qualified native Hawaiian relatives to whom his interest shall vest upon his death and reserves to the lessee the absolute right, at any time, to change his designation.

Charles, by his last designation submitted to and approved by the Commission, desired that Anthony be the successor to his lease. He reinforced his desire and intent by initiating summary possession proceedings to

evict Karen and Leroy from his homestead. That Charles repudiated his prior designation of Karen and any alleged contract had with Karen is evident by Charles' acts and deeds.

Thus, their contention is totally without merit.

- ii. There is no governmental taking of any kind for any purpose in this suit.

Counsel for Petitioners queries whether the construction of the HHCA provisions resulted in a taking of private property without compensation in violation of the V Amendment. Counsel suggests at page 26 of his petition that "It also appears that property has been confiscated for a federal use, the alleged rehabilitation of the Hawaiian race."

Notwithstanding the inapplicability of the V Amendment, there is not involved in this case a governmental taking of any kind.

Charles designated Anthony as his successor to his lease. Upon his death,



Charles' interest in the lease passed to Anthony by operation of law.

That there is no governmental taking is obvious and this contention is wholly without merit.

- iii. The construction of the HHCA provisions do not result in a violation of the 13th Amendment

A contract illegal because of statute does not render the service or performance executed thereunder slavery nor involuntary servitude.

Slavery suggests a condition whereby one person has the absolute power over the life, fortune and liberty of another. Involuntary servitude suggests a condition whereby one is subjected involuntarily to another person as his servant.

In this case the trial court essentially found that pursuant to Section 209(1) Charles had the absolute right to change his designation at any time, that Petitioners had no interest in the lease, and concluded that, on the theory of unjust enrichment, Petitioners



were entitled to judgment in the amount of \$12,616.

The facts involved in this case make the contention that Petitioners were subjected to a condition of slavery or were servants of Charles ludicrous.

iv. Sections 208(5) and 209(1), as construed and applied effectuates the purpose and policy of the HHCA.

As more fully discussed hereafter, the court properly construed the provisions of Sections 208(5) and 209(1) and that construction is clearly consistent with the purposes and policies of the HHCA.

B. The Court Did Not Err In Determining That Under § 208(5) and 209(1) of the HHCA A Lessee Has The Absolute Right To Change At Any Time The Designated Successor Of His DHHL Land Lease To Be Effective Upon The Lessee's Death.

Subsection 1 of Section 209 of the Hawaiian Homes Commission Act, 1920, as amended, (Act of July 9, 1921, c. 42, 42 Stat. 108), hereafter "HHCA", reads in pertinent part as follows:

§ 209. [Successors to lessees.]. (1)  
Upon the death of the lessee, his interest in the tract or tracts and the improvements thereon, including growing crops (either on the tract or in any collective contract or program to which the lessee is a party by virtue of his interest in the tract or tracts), shall vest in the relatives of the decedent as provided in this paragraph.  
From the following relatives of the lessee, husband and wife, children, widows or widowers of the children, grandchildren, brothers, and sisters, widows or widowers of the brothers and sisters, or nieces and nephews--the lessee shall designate the person or persons to whom he directs his interest in the tract or tracts to vest upon his death. Such person or persons must be qualified to be a lessee of Hawaiian home lands . . . provided, further, that such person or persons need not be twenty-one years of age. Such designation must be in writing, must be specified at the time of execution of such lease with a right in such lessee in similar manner to change such beneficiary at any time and shall be filed with the department and approved by the department in order to be effective to vest such interests in the successor or successors so named.

In the absence of such a designation as approved by the department, the department shall select from the relatives of the lessee in order named above as limited by the foregoing paragraph one or more persons who are qualified to be lessees of Hawaiian home lands, except as hereinabove provided, as the successor or successors of the lessee's interest in the tract or tracts, and upon the death of the lessee, his interest shall vest in the person or persons so selected. The department may select such a successor or successors after the death of the lessee, and the rights to the use and occupancy of the tract or tracts may be made effective as of the date of the death of such lessee.  
(Emphasis added.)

Upon examination of this subsection, it is clear that upon the death of the lessee, his interest in the tract or tracts and the improvements thereon "shall vest in the relatives of the decedent as provided in this paragraph." (Emphasis added.)

The subsection provides an enumerated list of relatives from among whom the lessee must designate the person or persons to whom he directs his interest in the tract to vest upon his death. The person so designated must be qualified to be a lessee of Hawaiian home lands. It is also clear from this subsection that such designation must be in writing, must be specified at the time of execution of the lease with a right in such lessee in similar manner to change such beneficiary at any time. It is required that such designation be filed with and approved by the department in order to be effective to vest such interests in the successor or successors so named.

This subsection provides also for the eventuality that the lessee does not so designate a successor. Should the lessee, while he is alive, fail to make such a designation approved by the department, the department is mandated "to select from the relatives of the lessee in order named" a successor to whom the lessee's interest shall vest upon the lessee's death. It is also provided that the "department may select such a successor or successors after the death of the lessee". (Emphasis added).

Only in the absence of a designation made by the lessee and approved by the department is the department authorized to designate a successor.

One can readily perceive the intent of Congress when it developed this plan of succession to a homestead lease. The lessee is given the absolute right to select his successor from among the enumerated list of qualified relatives. The lessee is also given the absolute right, at any time, to change his beneficiary.

On the other hand, only in the absence of such a designation, whether the lessee still lived or had died, is the department authorized to designate a successor. Ever then, such selection is required to be "from the relatives of the lessee in order named above". (Emphasis added.) That is, while the lessee is free to select from among the list of enumerated relatives, the department's authority to select is limited to the enumerated list of qualified relatives and in the order named.

Petitioners, on the other hand, suggest in essence that this absolute right to designate a successor and to change such designation at any time, is subject to being contracted away under the provisions of subsection (5) of Section 208, HHCA.

Under the provisions of Section 208(5), a homestead lessee may, with the approval of the department, transfer, mortgage, pledge or otherwise hold his leasehold interest for the benefit of any native Hawaiian regardless of the relationship, if any, to the lessee.

Extended to its logical conclusion, a homestead lessee could circumvent the provisions of Section 209(1) by contracting to devise his leasehold interest. Such a construction does not appear to be in keeping with Congress' intent.

On July 9, 1921, Congress enacted the Hawaiian Homes Commission Act, 1920 (Ch. 42, 42 Stat. 108). It is generally acknowledged that the primary purpose of the HHCA was the rehabilitation of native Hawaiians. The Committee on the Territories described in part the general policy underlying the bill for the enactment of the HHCA in these words.

Your committee is . . . of the opinion that (1) the Hawaiian must be placed upon the land in order to insure his rehabilitation; (2) alienation of such land must, not only in the immediate future but also for many years to come, be made impossible; (3) accessible water in adequate amounts must be provided for all tracts; (4) the Hawaiian must be financially aided until his farming operations are well underway. In framing such a program your committee is in a general way following the broad outlines of Senator Wise's plan.

H.R. Re. No. 839, 66th Cong., 2d Sess. 4 (1920).



Congress, under the HHCA, designated 203,500 acres, more or less, of public lands for the Hawaiian rehabilitation program. These lands were placed under the jurisdiction and control of a board known as the Hawaiian Homes Commission.

The Commission was authorized to lease to native Hawaiians tracts of land for a term of ninety-nine years with a nominal rental of one dollar a year. HHCA § 207. Each such lease was subject to the conditions imposed by HHCA § 208. In order to assist the homesteader, the Commission was authorized to make loans to the lessee (HHCA § 213) and to employ agricultural experts to assist the lessees in obtaining maximum utilization of the leased lands. (HHCA § 219).

For violation of any of the conditions of the lease or conditions of loan, the Commission was authorized, after due notice and an opportunity to be heard, to declare the lessee's interest in the tract and all improvements thereon to be forfeited and the



lease cancelled. (HHCA §§ 210, 216.) The Commission was authorized to seek the aid of the circuit court to enforce its judgment (HHCA § 217).

Under the provisions of the original HHCA, the homestead lessee was without authorization to designate a successor. Instead, upon his death, the homestead would descend as provided for by statute. Section 208(5) originally provided as follows:

(5) The lessee shall not in any manner transfer to, or mortgage, pledge, or otherwise hold for any benefit of, any other person, except a native Hawaiian, and then only upon the approval of the commission, or agree so to transfer, mortgage or pledge, or otherwise hold his interest in the tract. Such interest shall not, except in pursuance of a transfer, mortgage or pledge to or holding for or agreement with a native Hawaiian, be subject to attachment, levy, or sale upon court process. The lessee shall not sublet his interest in the tract or improvements thereon. Upon the death of the lessee his interest in the tract and improvements thereon shall vest under the limitations provided for homesteads in section 403 of the Revised Laws of Hawaii of 1915; . . . . (Emphasis added.)

Section 403, Revised Laws of Hawaii of 1915, provided in pertinent part:

Sec. 403. Not devised; descends to whom. In case of the death of any occupier or lessee, all the interest of such occupier or lessee, any conveyance, devise or bequest to the contrary notwithstanding in land held by such decedent by virtue of a certificate of occupation or a homestead lease shall vest in the relations of the decedent as follows: . . . (Emphasis added.)

Under the original HHCA, Section 208(5) governed the method of descent of the homestead. Under the referenced statute contained in Section 208(5), the homestead lessee was without authority to designate a successor. See Levy, Native Hawaiian Land Rights, 63 Cal. L. Rev. 848, 863 to 864 (1975), for discussion re Land Act of 1895.

Section 209 of the original HHCA, provided in its entirety as follows:

Sec. 209. All successors, whether by agreement or process of law, to the interest of the lessee in any tract, shall be deemed to receive such interest subject to the conditions which would rest upon the lessee, if he then were the party holding the interest in the tract. Provided, That a successor receiving such interest by inheritance shall not, during the two years following his inheritance, be deemed to have violated any of the conditions enumerated in section 208 of this title, even though he is not a native Hawaiian and does not on his own behalf occupy and use or cultivate the tract as a home or farm for such part of the year as the commission requires in accordance with the

regulations prescribed by it under paragraph (4) of section 208 of this title.

Thus, under the provisions of Section 208(5) as originally enacted, the homestead lessee could mortgage, pledge or otherwise hold his interest in the leasehold to another native Hawaiian. However, it is quite apparent that he could not contract to devise his leasehold interest to another since he had no power or right to designate a successor.

For a period of 16 years, there existed this statutory ban on testamentary disposition. Congress, by Pub. No. 200 (Act of July 10, 1937, 50 Stat. 497 et seq. at 504) amended, inter alia, Section 208(5) and 209. Since that amendment, Section 208(5) has remained unchanged except for the substitution of the word "department" wherever "commission" appeared pursuant to Act 207, Session Laws of Hawaii 1963.

Section 209, as amended in 1937 now authorized to some degree, the lessee to designate a successor to his leasehold interest. It provided in pertinent part:

A lessee shall furnish the Commission, in writing, the name or names of such person or persons being qualified native Hawaiian or Hawaiians, within the limits prescribed in the following sequence of succession, to whom he wishes his interest in the lease to be transferred after his death, this designation to be subject to the approval of the Commission: (1) In the widow or widower; (2) if there is no widow or widower, then in the children; (3) if there are no children, then in the widows or widowers of the children, (4) if there are no such widows or widowers, then in the grandchildren; (5) if there are no grandchildren, then in the brothers and sisters; (6) if there are no brothers or sisters, then in the widows or widowers of the brothers and sisters; (7) if there are no such widows or widowers of the brothers or sisters, then in the nephews and nieces.

In the absence of such designation the Commission shall choose a qualified native Hawaiian or Hawaiians in accordance with the foregoing sequence, either individually or collectively, except that such successor or successors need not be twenty-one years of age.

In explaining the changes, the Committee on Territories stated:

The purpose of this bill is to make various changes in the Hawaiian Homes Commission Act of 1920. The amendments are the result of nearly 2 years of study and discussion of the Hawaiian homes project as in operation under existing law by the recently reorganized Hawaiian Homes Commission, and a hold-over committee of the Legislature of Hawaii, and was adopted by the legislature at its regular biennial session in 1937, and approved by the Governor.

\* \* \* \* \*

Amendments to section 208 provide the method of handling liens on leases made by the Commission and authorize the Commission to advance taxes due by the homesteaders.

Amendments to section 209 prescribe a clear-cut policy concerning the succession of the interests of deceased homesteaders in their leaseholds which has not heretofore been done. (Emphasis added,)

S.R. No. 778, 75th Cong., 1st Sess. 1-2, (1937).

While the lessee was now authorized to designate a successor, he could only do so in the prescribed sequence of succession.

Four years later, by Public Law 325 (Act of November 26, 1941, C. 544 55 Stat. 762 et seq.) that Congress again amended Section 209. The Committee on Territories recommended passage of the proposed measure with certain amendments. The report stated in pertinent part, as follows:

The amendments are as follows:

Page 3, line 5 change the word "relations" to "relatives", to accord with the phraseology used in other parts of the bill.

Page 3, line 20, after the word "writing," insert the following language: "must be specified at the time of execution of such lease, with a right in such lessee in similar

manner to change such beneficiary at any time, and shall be".

The purpose of this bill is to make various changes in the Hawaiian Homes Commission Act of 1920, as shown by experience to be needed. (Emphasis added.)

S.R. No. 822, 77th Cong., 1st Sess. 1 (1941).

As amended in 1941, Section 209(1) has remained virtually unchanged. Throughout the provisions of subsection (1), Congress has used the word "shall" and "must" and in one instance the word "may" is found. Recognizing the caveat expressed in Endo v. Lear Siegler, Inc., 59 Haw. 612, 585 P 2d 1265 (1978) that the word "shall" in a statute is not dispositive of the issue of whether the statute is mandatory rather than directory, it nonetheless appears clear both from the reading of the statute as well as its history, that the provisions thereof are mandatory.

It seems clear Congress intended a separate, concise and exclusive method of succession of homestead leases under Section



209 of the HHCA. Under the terms of Section 208(5) as originally enacted, it is clear that a contract to devise would be void.<sup>6/</sup> And, as amended in 1937 and 1941, Section 209(1) clearly mandates the method of succession.

Contrary to the suggestion of Petitioners, the decisions of the courts display no indication of "localism" or "provincialism." The considered decisions reflect a true

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6/ Regarding this aspect, the House Committee on Territories stated in part:

. . . The Hawaiian home lands are placed under the control of the commission to be used and disposed of for the purpose of aiding native Hawaiians. (See Sec. 204.)  
. . . The title to these lands, as is true of all public lands of the Territory, remains in the United States. (See Sections 207 and 208.) . . . Upon the death of the lessee his lands may not be willed but must descend within his family as provided by the existing laws of the Territory relating to homesteads.  
. . .

HR. Rep. No. 839, 66th Cong., 2d Sess. 4  
(1920).



appreciation of the purposes and policies of the HHCA, and properly concluded that a private agreement (such as the alleged oral agreement involved herein) could not alter the "clear and plain" import of its provisions.

C. There Is No Federal Question  
Involved In This Case

For the reasons noted in the foregoing, it appears obvious no federal question is involved in these cases.

Petitioners contend they had a contract, performed thereunder, and therefore are entitled to exact the agreed upon performance in exchange. Upon the repudiation of the alleged contract by Charles, they recognized and apparently accepted the repudiation and elected to sue for specific performance, or in the alternative for damages apparently on the theory of an anticipatory breach of the alleged oral contract to devise. They pursued their remedy and obtained a judgment in the amount of \$12,216 against Charles.

Notwithstanding their election, they persist in their argument that the construction by the courts of Sections 208(5) and 209(1) renders their contractual rights unenforceable, thus resulting in the deprivation of their constitutional due process rights under the 5th and 14th Amendments. They further suggest that as a result of their inability to enforce their contract, the services rendered thereunder reduced them to the status of involuntary servants and peons in violation of the 13th Amendment.

Such contentions are without merit. It presumes the existence of a valid contract. Here, since the alleged agreement was in contravention of law, there was no enforceable contract. Even assuming the existence of a valid contract, their argument seems to suggest no statute may deprive them of the right to enforce the contract. If such statute does, then that statute violates their 5th and 14th Amendments due process

rights and renders the service performed done under a condition of involuntary servitude or peonage. Such contention, if accepted, would almost assuredly, and singlehandedly, negate the various statutes of limitations, statutes of fraud, statutes regulating licensing of businesses, professions, and the like. These statutes, for the reasons underlying their enactment, proscribe the enforcement of contracts made in contravention thereof.

Clearly, the contention of Petitioners are without merit and, more importantly, raise no federal questions.

V. CONCLUSION

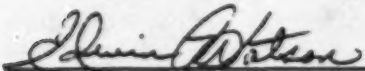
This court should deny the petition for writ of certiorari because this matter essentially involves a state matter and interpretation of state laws and involves no federal interest or question. The decisions of the Hawaii Supreme Court and the Hawaii

Intermediate Court of Appeals are clearly in keeping with sound judicial principles of law.

DATED: Honolulu, Hawaii, April 19, 1984.

Respectfully submitted,

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Attorneys for State  
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CERTIFICATE OF SERVICE

I, Edwin P. Watson, hereby certify that on this 21st day of April 1984, three copies of the Brief in Opposition to Petition for Writ of Certiorari in the above-entitled case were mailed, postage prepaid, to the following Counsels:


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I further certify that all parties required to be served have been served.

  
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